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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS GAUTHIER,

Defendant and Appellant.

D042781

(Super. Ct. No. SCD169660)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsén, Judge. Affirmed.

Thomas Gauthier entered a guilty plea to gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)),¹ and causing injury while driving under the influence of alcohol (Veh. Code, § 23153, subd. (a)), with a blood/alcohol level of .08 percent or greater (Veh. Code, § 23153, subd. (b)), both Vehicle Code section 23153

¹ All statutory references are to the Penal Code unless otherwise specified.

violations were enhanced by causing great bodily injury (§ 12022.7, subd. (a)) and causing injury or death to more than one victim (Veh. Code, § 23558). The court sentenced him to prison for the six-year middle term for gross vehicular manslaughter while intoxicated, imposed a concurrent term on the causing injury while driving under the influence and enhancements on that conviction, and stayed sentence on the conviction of causing injury while driving with a blood/alcohol level .08 percent or more and the enhancements on that conviction. (§ 654.) Gauthier contends the trial court erred in denying probation.

FACTS

Around 1:15 a.m. on August 31, 2002, a motorist advised the highway patrol that a white pickup truck was traveling at a high rate of speed southbound in the northbound lanes of Interstate 5. Shortly thereafter, Ernesto Colin was driving westbound on Highway 94 with his three-year-old son in a car seat. Colin collided head on with the white pickup truck Gauthier was driving at a high rate of speed eastbound in the westbound lanes of Highway 94. Colin's child was thrown from the car and died at the scene. Colin sustained a fractured hip. A responding highway patrol officer detected an odor of alcohol emanating from Gauthier who had bloodshot, watery eyes and slurred speech. Gauthier told the officer he had consumed a 12-pack of beer and was taking prescribed Vicodan and Midrin. Gauthier claimed he was driving westbound in the slow lane when he was rear ended by another driver. A blood test revealed Gauthier had a blood/alcohol level of .20 percent.

DISCUSSION

Arguing the trial court erred in denying probation, Gauthier points out he has no criminal record (Cal. Rules of Court, rule 4.414(b)(1)),² is remorseful (rule 4.414(b)(7)), has an abundance of community support, and is willing and able to comply with the terms of probation (rule 4.414(b)(3), (4)). He recognizes he is presumptively ineligible for probation (§ 1203, subd. (e)(3)) but notes that the trial court found the presumption rebutted by his youth and lack of a criminal record. He challenges the determination to deny probation on the ground that the trial court erroneously relied on improper reasons: vulnerability of the victims, infliction of emotional injury on the three-year-old's mother, the degree of monetary loss, and the nature of the crime.

At the outset, the People argue Gauthier waived the right to challenge on appeal the reasons for denying probation since he did not object to the reasons in the trial court. In *People v. Scott* (1994) 9 Cal.4th 331, 356, the Supreme Court said, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." However, the party who seeks to challenge on appeal reasons for a sentencing choice must have been given a meaningful opportunity to object to the reasons in the trial court. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) In *Gonzalez*, the Supreme Court said:

"As previously explained, the *Scott* rule applies when the trial court 'clearly apprise[s]' the parties 'of the sentence the court intends to impose and the reasons that support any discretionary choices' [citation], and gives the parties a chance to seek 'clarification or

² All rule references are to the California Rules of Court.

change' [citation] by objecting to errors in the sentence. The parties are given an adequate opportunity to seek such clarifications or changes if, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing. The court need not expressly describe its proposed sentence as 'tentative' so long as it demonstrates a willingness to consider such objections. If the court, after listening to the parties' objections, concludes that its proposed sentence is legally sound, it may simply state that it is imposing the sentence it has just described, without reiterating the particulars of that sentence. By contrast, if the trial court finds that one of the parties has raised a meritorious objection to the proposed sentence, it should alter its sentence accordingly.

"It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable." (*People v. Gonzalez, supra*, 31 Cal.4th at p. 752, quoting *People v. Scott, supra*, 9 Cal.4th at pp. 351, 356.)

Here, after reviewing the relevant documents and hearing argument of counsel, the court imposed the sentence including the reasons Gauthier now challenges. After doing so, the court and counsel, including defense counsel, discussed a possible restitution hearing. Defense counsel did not mention the court's denial of probation or object to the reasons for denying probation. While the court did not express its proposed sentence and if the parties had objection to the proposed sentence, defense counsel had a meaningful opportunity to object to the reasons the trial court gave for denying probation but did not do so, Gauthier cannot raise the issue for the first time on appeal.

Gauthier mentions that if we find he waived the right to raise the sentencing issue on appeal because his trial counsel did not object in the trial court, he was denied effective assistance of counsel. "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective

assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The record here does not indicate that Gauthier's trial counsel was asked for an explanation of his conduct, and we are unable to say there could be no satisfactory explanation for not objecting in the trial court. If Gauthier wishes to pursue this issue he must seek habeas corpus relief in the trial court.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.